

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	No. CR19-159-RSL
	)	
Plaintiff,	)	
	)	REPLY TO GOVERNMENT’S
v.	)	RESPONSE TO MOTION FOR <i>BRADY</i>
	)	ORDER
PAIGE A. THOMPSON,	)	
	)	
Defendant.	)	

Contrary to the government’s claims in its opposition, on June 25, 2021, Magistrate Judge McCandlis reminded the government that under the Due Process Protection Act (“DPPA”) it is obligated to disclose exculpatory information in a “timely manner.” (*See* Dkt. 218 at 7; Dkt. 106.)<sup>1</sup> The government has failed to live up to that obligation. The government’s failure necessitates the requested *Brady* order to protect Paige Thompson’s rights.

**A. The government’s own brief reveals why a new, written DPPA order is needed—to clarify their obligations.**

The government’s brief exemplifies the reasons Congress passed the DPPA and why this Court should enter a precise *Brady* order because it attempts to apply the currently inapplicable post-trial materiality and favorability standards. Specifically, the government argues that it disclosed the March 2019 note despite its “analysis of materiality or favorability,” suggesting the government has generously gone above and

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<sup>1</sup> The Clerk of the Court has an audio recording of this hearing.

1 beyond its obligations. (Dkt. 218 at 7.) It has not. And in so contending, the government  
2 reveals its narrow view of its disclosure obligations, which are at odds with the  
3 applicable standard.

4 Courts recognize that *Brady* applies differently at the appellate and trial levels,  
5 and the materiality standard for reversal on appeal is not the same as the disclosure  
6 standard before trial. By erroneously relying on the appellate *Brady* standard, the  
7 government ignores the robust caselaw recognizing the intellectual gymnastics that  
8 would be required to apply an appellate materiality standard at trial. Applying this  
9 incorrect standard would require the government to know what is material to a defense  
10 before it is presented. This obviously cannot be done, and courts have long recognize  
11 the appellate standard cannot be applied at trial.

12 For example, in *U.S. v. Sudikoff*, Judge Pregerson in the Central District of  
13 California observed that applying an appellate materiality standard at the trial level puts  
14 the cart before the horse: “[w]hether disclosure would have influenced the outcome of a  
15 trial can only be determined after the trial is completed and the total effect of all the  
16 inculpatory evidence can be weighed against the presumed effect of the undisclosed  
17 Brady material.” 36 F. Supp. 2d 1196 at 1198-99 (C.D.Cal. 1999). It is impossible to  
18 gauge what would impact the result prior to trial.

19 Judge Friedman in the District of Columbia arrived at the same conclusion. *See*  
20 *U.S. v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005). In *Safavian*, Judge Friedman unpacked  
21 the problem in blunter terms: “[t]he problem with this iteration of Brady and the  
22 government’s view of its obligations at this stage of the proceedings, however, is that it  
23 permits prosecutors to withhold admittedly favorable evidence whenever the  
24 prosecutors, in their wisdom, conclude that it would not make a difference to the  
25 outcome of the trial. Most prosecutors are neither neutral (nor should they be) nor  
26 prescient, and any such judgment necessarily is speculative on so many matters that

1 simply are unknown and unknowable before trial begins. . . .” *Id.* at 16.<sup>2</sup> Indeed, in line  
 2 with these decisions, many districts across the country have adopted local rules omitting  
 3 any materiality requirement.<sup>3</sup>

4 The Ninth Circuit addressed the issue in *U.S. v. Price*, telling prosecutors not to  
 5 apply *Brady*’s appellate standard at the trial level. 566 F.3d 900 (9th Cir. 2009). The  
 6 Ninth Circuit stated that “[f]or the benefit of trial prosecutors who must regularly  
 7 decide what material to turn over, we note favorably the thoughtful analysis set forth by  
 8 two district courts in this circuit . . .,” both of which conclude “[t]he ‘materiality’  
 9 standard usually associated with *Brady* . . . should not be applied to pretrial discovery  
 10 of exculpatory materials. . . .” *Id.* at 913 n.14; *see also U.S. v. Olsen*, 704 F.3d 1172,  
 11 1183 n.3 (9th Cir. 2013) (“trial prosecutor’s speculative prediction about the likely  
 12 materiality of favorable evidence . . . should not limit the disclosure of such evidence,  
 13 because it is just too difficult to analyze before trial whether particular evidence  
 14 ultimately will prove to be ‘material’ after trial”). If any doubt remained, in the summer

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15 <sup>2</sup> The district court decisions in *Sudikoff* and *Safavian* are not outliers. *See, e.g., U.S. v. Acosta*,  
 16 357 F. Supp. 2d 1228 (D. Nev. 2005) (adopting reasoning in *Sudikoff*); *U.S. v. Peitz*, NO. 01-  
 17 RC825, 2002 WL 226865 at \*3 (N.D. Ill. Feb. 14, 2002) (“The usual formulation of the *Brady*  
 18 standard, however, is designed for review after the trial or sentencing and understandably  
 19 considers the probable effect on the verdict or sentence. On a pretrial discovery motion,  
 20 however, the standard is necessarily somewhat different.”); *U.S. v. Carter*, 313 F. Supp. 2d  
 921, 925 (E.D. Wis. 2004) (“I agree with the *Sudikoff* and *Peitz* courts that, in the pre-trial  
 context, the court should require disclosure of favorable evidence under *Brady* and *Giglio*  
 without attempting to analyze its ‘materiality’ at trial.”).

21 <sup>3</sup> *See, e.g.,* Crim. L.R. 17.1-1(b)(3) (N.D. Cal.) (requiring pretrial conference statement on  
 22 “disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or  
 23 punishment”); General Order 0534 (M.D. Ala.) (requiring disclosure of “all information and  
 24 material known to the government which may be favorable to the defendant on the issues of  
 25 guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373  
 26 U.S. 83 (1963)”); Crim. L.R. 16(b)(1)(B) (S.D. Ala.) (same); L.R. 26.2(D)(1) (N.D. Fla.)  
 (same); L. Cr. R. 16.1(f) (S.D. Ga.) (requiring disclosure of “any evidence favorable to the  
 defendant”); L. Cr. R. 16.1(b)(7) (E.D.N.C.) (requiring disclosure of “any exculpatory  
 evidence”); L. Cr. R. 16.1(C) (W.D. Pa.) (requiring disclosure of “exculpatory evidence”); L.R.  
 Crim. P. 16.1(a) (S.D. W. Va.) (incorporating order requiring disclosure of “all evidence  
 favorable to defendant”).

1 of 2020, the Ninth Circuit held that the “retrospective definition of materiality is  
 2 appropriate only in the context of appellate review,” not at the trial court, where “the  
 3 question before trial is not whether the government thinks that disclosure . . . might  
 4 change the outcome of the trial going forward, but whether the evidence is favorable  
 5 and therefore must be disclosed.” *U.S. v. Bundy*, 968 F.3d 1019, 1033 (9th Cir. 2020)  
 6 (quoting *Safavian*, 233 F.R.D. at 16).

7 It is no surprise the government applies that post-trial standard because the  
 8 DOJ’s official position in its own Manual<sup>4</sup> considers materiality. The Manual states that  
 9 “[e]xculpatory and impeachment evidence is **material** to a finding of guilt—and thus  
 10 the Constitution requires disclosure—when there is a reasonable probability that  
 11 effective use of the evidence will **result in an acquittal**.”<sup>5</sup> Under that reading, a  
 12 prosecutor sitting alone in his or her office may suppress information favorable to a  
 13 defendant—with no court oversight—by gauging its magnitude as less than acquittal-  
 14 worthy. That is the view being espoused here, and it is wrong.

15 This is not the first time. As explained at the hearing on March 15, 2022, e-mails  
 16 from alleged Victims 7 and 8 representing to the government that they have no  
 17 evidence of mining on their servers were withheld from the defense until after the  
 18 pretrial motions deadline even though they were in the government’s possession long  
 19 before that date. (Dkt. 163, Ex. 5 at 8, 16.) That information was also withheld even  
 20 though Judge McCandlis had reminded the government to disclose *Brady* in a timely  
 21 fashion.

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24 <sup>4</sup> “The Justice Manual” lists DOJ’s policies and procedures.

25 <sup>5</sup> *Justice Manual* – §9-5.001 – Policy Regarding Disclosure of Exculpatory and Impeachment  
 26 Information, available at <https://bit.ly/JusticeManual-Materiality>, accessed on March 18, 2022  
 (emphasis added).

1 At this point, it appears clear the government is applying its preferred (and  
2 personally favorable) interpretation of *Brady*, and for that reason alone, a more precise  
3 *Brady* order is warranted.

4 **B. The government adopts conflicting and self-serving personal views of the**  
5 **evidence to alleviate its disclosure obligations.**

6 The defense disputes the government’s characterization of the information that it  
7 failed to disclose. In trying to support its late disclosure, the government first claims  
8 that “the May 2019 note, and Capital One’s investigation of it, are irrelevant,” and then,  
9 just one paragraph later, the government claims the note and investigation are “actually  
10 inculpatory.” (See Dkt. 218 at 8.) This contradiction makes little sense. Either the  
11 information is irrelevant, bearing no relationship to the charges, or it is inculpatory,  
12 bearing direct relationship to the charges.

13 The same is true for Capital One’s investigation—which, as the government  
14 concedes, “did not believe that Ms. Thompson disseminated its data or used it for  
15 fraudulent purposes.” (*Id.* at 9.) But that is not what the information states, it states that  
16 the belief was formed after a forensic analysis and based on the government’s  
17 investigation. On or about March 19, 2020, in the newly disclosed information,  
18 possessed by the DOJ team, Capital One represented in its proxy statement that the U.S.  
19 Attorney’s Office has stated that it believes the data has been recovered and that there is  
20 no evidence it was used for fraud or shared by this individual. It is irrelevant that this  
21 information was publicly available in hundreds of pages of proxy material, what’s  
22 relevant is that it was in the government’s possession.

23 The government claims that it need not disclose the information because: (1) Ms.  
24 Thompson already knew Capital One didn’t believe she did anything fraudulent; and  
25 (2) the defense already had “similar statements from Capital One.” (*Id.*) To be clear, the  
26 defense believes the government is obligated to disclose every single time that Capital

1 One states in writing that Ms. Thompson lacked fraudulent intent, never disseminated  
2 the data, and never used it for fraudulent purposes based on its own belief and  
3 investigations or its conversations with the government. Ms. Thompson is entitled to  
4 show that Capital One has consistently, repeatedly, and unwaveringly stated there was  
5 no fraudulent use of the data. The only entity that believes fraud existed is the  
6 government.

7 **C. A detailed *Brady* order is necessary to ensure timely disclosure.**

8 This case has been ongoing for two years, and the timing of these ongoing *Brady*  
9 disclosures troubles the defense. The DOJ team has possessed highly relevant but  
10 undisclosed information since 2019, keeping the defense in the dark. "The parties also  
11 discussed the fact that this [disclosing Capital One's data] might not be an issue that  
12 ever needed to be addressed, if the case were resolved, as then appeared likely." (Dkt.  
13 145 at 4.) In any criminal case, a defendant weighs their trial risks before determining  
14 whether to accept a plea offer, and that is why the government's late disclosure—  
15 multiple years into litigation and just months before trial—is so troubling. It prevents  
16 defendants from accurately predicting the government's evidence, applicable precedent,  
17 and risks at trial while enduring enormous pressure to plead.

18 One of the deeply troubling aspects of this late disclosure is that it came about  
19 accidentally. The government reveals that it learned about these materials—information  
20 long possessed by DOJ itself—only because Capital one mentioned it in discussions.  
21 (Dkt. 218 at 3.) The government stated "our office learned *from Capital One* that it also  
22 had provided documents to Main Justice, and had made a subsequent presentation to  
23 Main Justice" *three years ago* in March and April 2019. (*Id.* (emphasis added).) This  
24 signals that the *Brady* information was uncovered not through government diligence but  
25 through chance. A detailed *Brady* order is necessary to ensure the government complies  
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1 with its obligation to seek out and find favorable information in the government's  
2 hands.

3 DATED: March 18, 2022.

4 Respectfully submitted,

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